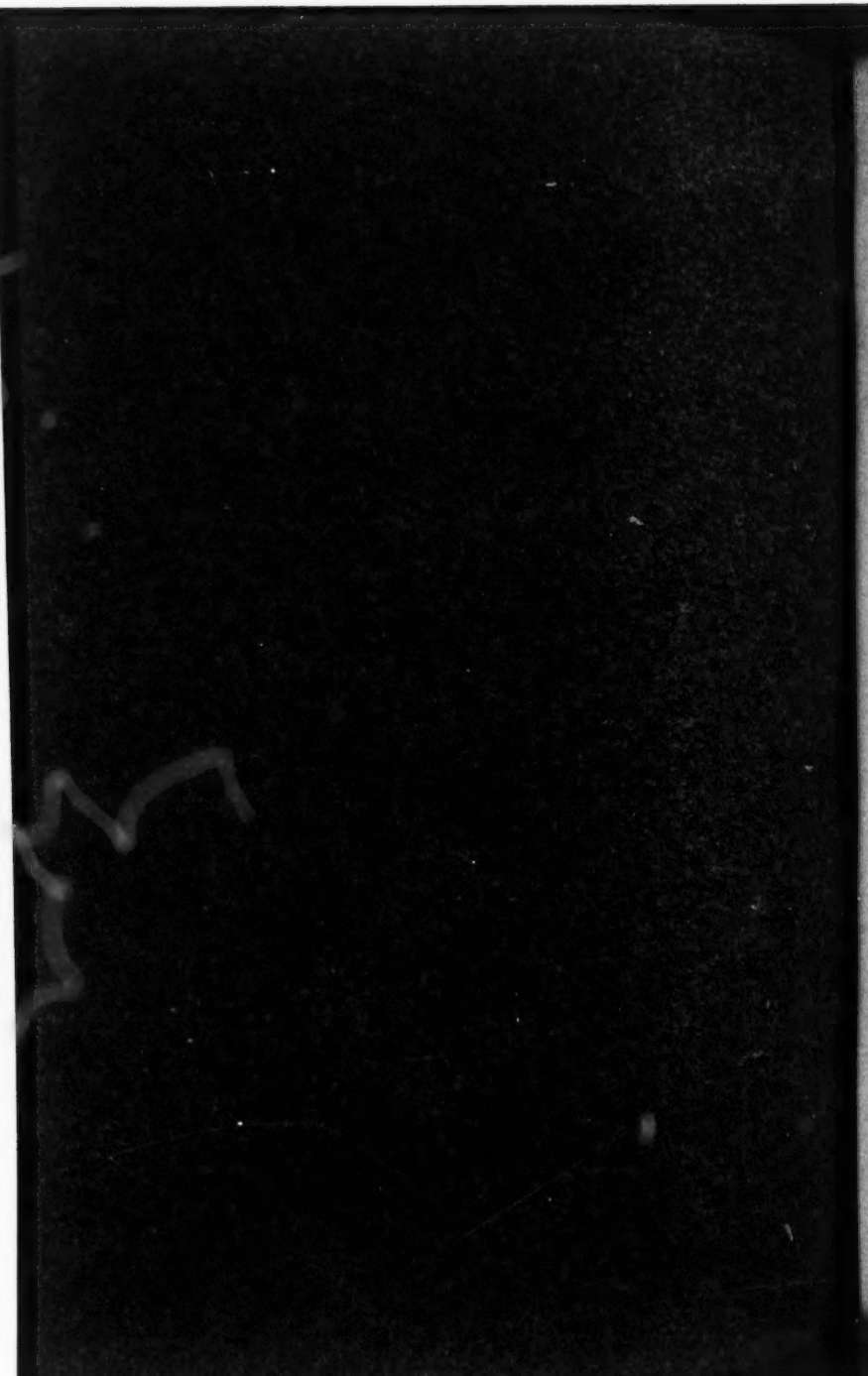

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE MORRISDALE COAL COMPANY, *Appellant*,
v.
THE UNITED STATES.
No. 65.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on appeal from a judgment of the Court of Claims sustaining a demurrer which challenged the jurisdiction of that court and questioned the sufficiency of the facts averred in claimant's petition to constitute a cause of action. The petition alleged that claimant (prior to advent of federal control) had contracted for the sale of the total output of its coal mines; that, thereafter, during June to November, 1918, twelve thousand and odd tons were "requisitioned" and diverted elsewhere, the price received being less than the sale price agreed to by its former customer; that the coal was thus diverted by order of the Fuel Administration

under powers conferred by the Act of August 10, 1917, ch. 53 (40 Stat. 276).*

Scope of the issues raised by the pleadings.

Appellant does not here insist that its output was actually expropriated or used for any governmental purpose. The petition does not aver with requisite legal certainty that claimant's property was requisitioned for public uses. Nevertheless, in the brief some reliance is placed on the allegation that the Fuel Administration "requisitioned" and compelled petitioner to divert certain tonnage. It is urged that since the demurrer admits the allegation that the coal was "requisitioned," etc., a taking is admitted. But the allegation that the property was "requisitioned" (if by this is meant that property was expropriated by eminent domain for federal uses) is a mere legal conclusion from the facts stated which is not admitted but expressly challenged by the demurrer.

The claimant did not below and does not here contend that its case is in any wise laid under any

* Sec. 25 of this Act (known as the Lever Act) reads in part: That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. (40 Stat. 284.)

By Executive Order of the President dated August 23, 1917, a fuel administrator was appointed.

The United States Fuel Administration was created by Proclamation o March 15, 1918, 40 Stat. 1757.

of the remedial provisions of the Lever Act. It is, consequently, not necessary to argue the obvious proposition that the language of this statute does not impose upon or admit the liability of the United States to make good the differences between prices fixed during federal control and prices which might otherwise have been obtained either in open market or under sales contracts made prior to the order of the Fuel Administration.

In substance, therefore, the asserted expropriation of property consists simply in claimant's obedience to an order compelling it to divert a portion of its output, thereby preventing compliance with sales contracts previously entered into with other parties at a better price, and the sole question presented is whether, in time of war, exercise to this extent of federal power in regulating price and controlling distribution of coal amounts in law to a taking of private property for public use, entitling claimant to recover in the Court of Claims compensation under the fifth amendment.

ARGUMENT.

The applicable portions of the Lever Act regulating the coal industry are a valid exercise of the war powers of Congress.

Claimant does not contest the constitutionality of this legislation. Under the war powers expressly delegated coupled with the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *" the fed-

eral government, when exercising this constitutional function, possesses full sovereignty subject only to the limitations written in the Constitution.

Hamilton v. *Kentucky Distilleries*, 251 U. S. 146;

Jacob Ruppert v. *Caffey*, 251 U. S. 264, 301.

The scope of the war power is quite as wide as that of the power to regulate interstate commerce.

Cf. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 480;

Atlantic Coast Line v. *Riverside Mills*, 219 U. S. 186, 201.

That for the war period* and for the war purposes set forth in section 1, Congress might constitutionally fix the price and regulate distribution of coal, can not be doubted.

In *Hamilton* v. *Kentucky Distilleries, supra*, this court sustained power to forbid altogether sale of a lawful commodity, saying: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."

No constitutional objection to federal price regulation, etc., in war time exists because of the fact that similar regulation by states is ordinarily classed or defined as exercise of "police power."

* The life of the act was so limited, sec. 24, p. 283.

Federal regulation of the sale and distribution of coal is constitutionally justified whenever it fairly appears to the legislative mind that this business is clothed with a public interest reasonably calling for federal control to meet the exigencies of war.

This court in *Block* v. *Hirsh* (decided April 18, 1921), sustaining emergency regulation of rent, said:

> Circumstances may so change in time or so differ in space as to clothe with a public interest what at other times or in other places would be a matter of purely private concern * * *.
>
> If the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn* v. *Illinois*, 94 U. S. 113. 41 Sup. Ct. Rep. 458.

Block v. *Hirsh* involved exercise of police power in the District of Columbia. It stands, however, on ground no more solid than federal regulation of coal (the one indispensable material of modern war) under the war power.*

Public regulation otherwise valid is not objectionable because thereby a contract valid in its inception becomes impossible of performance.

If an industry be of the class declared affected by a public interest and hence subject to legislative control in its methods of business and in its charges,

* The constitutionality of sec. 25 of the Lever Act has been sustained.
United States v. *Ford*, 265 Fed. 424;
United States v. *Central Coal Co.*, 256 Fed. 703;
Cf. *American Coal Mining Co.* v. *Special Coal, etc., Commission of Indiana*, 268 Fed. 563.

the power to regulate must necessarily be unaffected and undiminished by the existence of contracts entered into prior to the advent of public control.

Union Dry Goods Co. v. *Georgia, etc.*, 248 U. S. 372, 375.

Producers Transportation Co. v. *R. R. Commission, etc.*, 251 U. S. 228, 232.

Every such contract is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value.

L. & N. R. R. v. *Mottley*, 219 U. S. 467, 480–486;

Knoxville Water Co. v. *Knoxville*, 189 U. S. 434, 438.

To assert that its existing contracts excluded this claimant's industry from the field of "uncompensated" legislative control of its charges and deliveries is to deny the possibility of *any effective regulation.*

The principle stated is not affected by the circumstance that federal regulation of the coal industry under the war powers is a legislative novelty.

In *Vandalia Coal Company* v. *Special Food & Coal Commission*, 268 Fed. 572, an order of a state commission requiring delivery of coal to specified concerns was temporarily enjoined because it affected the mining company's existing contracts to deliver coal elsewhere. The order was held void because the recognized principle that existing contracts must be deemed to have been made subject to the reserved power to regulate industry (police power) was thought to apply only to such industries as were (at the time

of the passage of the regulating statute) "public utilities," i. e., recognized as affected by a public interest, and did not apply to a purely private enterprise which, for the first time, is declared by the state to be affected with a public interest.

The case deals only with state police power, but it is believed that the principle announced is without support in reason or authority.

It will be sufficient to cite a few controlling decisions of this court.

In the leading case which dealt with a regulation fixing maximum charges for storage of grain, this court said:

> Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.
>
> It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regula-

> tions complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good.
>
> *Munn* v. *Illinois*, 94 U. S. 113, 133.

In answer to the contention that fire insurance was a private business not within the police power to the extent of fixing rates, this court said, in substance, that the test is not whether a *public trust* has been imposed upon the *property* but whether the *business* has become so far affected with a public interest as to justify legislative regulation of rates.

> *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 407, 411.

The reasoning of this case demonstrates that full exertion of all the incidents attendant upon power to regulate does not in any sense hinge upon the circumstance that the business has been theretofore regarded as a public utility so-called.

Legislation regulating rents in the District of Columbia affected directly a valuable right to enforce the tenant's covenant to surrender possession of real estate on expiration of the term. The legislation was novel but this circumstance could not and did not affect the reserved power to legislate, although thereby a pre-existing contract otherwise valid was rendered unenforceable.

> *Block* v. *Hirsch*, 41 Sup. Ct. Rep. 458;

Marcus Brown Holding Co. v. *Feldman*, 269 Fed. 306;

Same v. *Same*, 41 Sup. Ct. Rep. 465;

People ex rel Realty Corporation v. *La Fetra*, 230 N. Y. 429.

The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised.

German Alliance Insurance Co. v. *Kansas*, 233 U. S. 389, 415–6.

The application of the principle that a valid contract may be rendered unenforceable or worthless by the exercise of federal power cannot turn on the consideration that the power has been hitherto dormant. To assert the contrary is to deny the power.

Regulation affecting preexisting contracts is not an exercise of eminent domain power.

The diversion of coal in question here was not a taking of private property for public use binding the Government to indemnify.

Public regulation restrictive of freedom of contract and of self-controlled business management is universally imposed without provision for compensation. It is the universal rule that regulation constitutionally permissible does not involve exercise of the power of eminent domain.

Contentions that public regulation imposing burdens or diminishing the usefulness or value of property is an expropriation requiring indemnity, have been everywhere denied. The underlying principle

is that unless property is actually taken—unless it is directly put to use by the State for a public purpose—no duty to compensate arises since the injury complained of results incidentally from valid exercise of governmental power. In these circumstances there is no taking.

Legal Tender Cases, 12 Wall., 457, 551;
Transportation Co. v. *Chicago*, 99 U. S. 635, 642;
Gibson v. *United States*, 166 U. S. 269, 271, 275–6;
Scranton v. *Wheeler*, 179 U. S. 141, 164;
Wisconsin, etc. Ry. v. *Jacobson*, 179 U. S. 287, 296, 301;
Railroad v. *Mottley, supra;*
C., B. & Q. Ry. v. *Drainage Com'rs, etc.*, 200 U. S. 561, 582–4, 590–4;
Atlantic Coast Line R. Co. v. *Goldsboro*, 232 U. S. 548, 558;
Hamilton v. *Kentucky Distilleries*, 251 U. S. 146, 156–7.

It is doubtful whether any case can be found which has imposed on the public the losses, real or speculative, claimed to have resulted from loss of the right to conduct business without control of charges and free from other burdens incident to legislative regulation.

That obedience to a regulation admitted to be valid imposes on the federal treasury an obligation, cognizable in the Court of Claims, to reimburse for additional profits expected is a contention unsupported by precedent. The theory urged would have

opened the way to recovery from the government of the losses of every railroad limited by the Interstate Commerce Commission to rates less than those stipulated in existing contracts with shippers. It would compel reimbursement from the Treasury of every landlord deprived of increased rent agreed to be paid him by a prospective lessee on expiration of an existing tenancy extended indefinitely by the District of Columbia Rents Act and by action thereunder by the Rent Commission at rental substantially less than that which, but for the statute, the landlord might have received under his contract with his chosen new tenant.

It suffices to reply that the jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property must rest on the receipt of a consideration moving to the United States. Where nothing is actually taken and used there is no basis for an implied promise to make compensation.

Bothwell v. *United States*, 254 U. S. 231.

The price fixed for claimant's coal was not confiscatory.

There is no allegation in the pleadings that the price fixed by the Fuel Administration and received by claimant for the diverted coal did not afford a fair return and reasonable profit on invested capital over and above cost of production and plant depreciation.

The principles announced in the *Minnesota Rate Cases*, 230 U. S. 352, governing controversies as to

the confiscatory character of rate regulation have consequently no application here.

It is submitted that the judgment should be affirmed.

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